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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NUUELUA SOFARA et al.,

Defendants and Appellants.

H033652

(Santa Clara County

Super. Ct. No. CC513667)

Defendants Nuuelua Sofara, Fealofai Sofara, Siaosi Loia, Travis Atualevao and Jonathan Leaupepe appeal the trial court's order that they are jointly and severally liable for restitution in the amount of \$27,044.97. On appeal, defendants assert the court erred in ordering the restitution in this case.

STATEMENT OF THE FACTS AND CASE

In December 2005, victims Trevor Devoe and Irwin Dillon were at a party in Milpitas when Dillon heard his car alarm. Devoe and Dillon left the party to check on Dillon's car, and found defendants and Michael Eti, members of the C-Street gang, in the parking lot. Defendants attacked Devoe, punching and kicking him. During the attack, Eti told defendants to move out of the way, and he fired several shots at Devoe, killing him.

Dillon attempted to get away. Defendants chased him down and punched him. Eti then told defendants to move, and he shot Dillon in the head. Dillon died later that night at the hospital. After the shooting, Eti yelled epithets associated with the C-Street gang.

In March 2006, an information was filed charging defendants with two counts of murder pursuant to Penal Code, section 187.¹ The information also alleged that the murders were committed for the benefit of, at the direction of and in association with a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C).

Loia, Leaupepe, and Atualevao pleaded no contest to two counts of assault with a firearm pursuant to Penal Code, section 245, subdivision (b), and admitted the gang enhancement as to each count. These three defendants were sentenced to a total term of 11 years in state prison.

Nuuelua Sofara and Fealofai Sofara pleaded no contest to one count of assault with a firearm pursuant to section 245, subdivision (a)(2), and one count of assault with force likely to produce great bodily injury pursuant to section 245, subdivision (a)(1). Both defendants also admitted the gang enhancement as to the assault with a firearm count. These two defendants were sentenced to a total of 10 years in state prison.

The court ordered that defendants are jointly and severally liable for \$27, 044.97 in restitution to the victims' families pursuant to section 1202.4, subdivision (f). The breakdown of the restitution order is as follows:

- 1) \$7,500.00 in funeral expenses paid by the family of Irwin Dillon;
- 2) \$4,853.97 in funeral expenses paid by Irwin Dillon's maternal grandmother, Eddie Alexander;

¹ All further statutory references are to the Penal Code.

Micheal Eti was also charged in the information. In 2007, Eti pleaded guilty to two counts of murder (§ 187), and admitted the gang enhancement as to each count (§ 186.22, subd. (b)(1)(C).)

- 3) \$900.00 in travel expenses paid by Irwin Dillon's uncle, Murray Dillon, for his grandparents to attend court proceedings;
- 4) \$60.00 in parking and travel expenses of Irwin Dillon's aunt, Cassandra Carter, for her to attend court proceedings;
- 5) \$7,679.00 in medical expenses incurred by Irwin Dillon's parents before his death; and
- 6) \$6,052.06 in expenses incurred by Trevor Devoe's mother, Jackie Devoe, for funeral expenses, lost wages and parking fees to attend court hearings.

Defendants appeal the court's order of restitution.

DISCUSSION

Defendants assert the trial court erred in ordering restitution for costs associated with the death of Irwin Dillon and Trevor Devoe. The primary basis for defendants' objection to the restitution award is that they were not convicted for crimes that resulted in the victims' deaths, and therefore, any costs related to the deaths is not a direct cause of their criminal conduct. In addition, defendants argue the restitution amount ordered to pay for Dillon's medical expenses should be reduced by the amount paid by his insurance carrier. Finally, defendants assert reimbursement to Murray Dillon and Cassandra Carter is not appropriate, because as Irwin Dillon's aunt and uncle, Murry Dillon and Cassandra Carter are not included in the statute as family members entitled to restitution.

"Our constitution provides that 'It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.' (Cal. Const., art. I, § 28, subd. (b).) The Legislature has affirmed this intent, providing in Penal Code section 1202.4, subdivision (a)(1), that a 'victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution

directly from any defendant convicted of that crime.’ ” (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049 (*Woods*).)

“A restitution order is reviewed for abuse of discretion and will not be reversed unless it is arbitrary or capricious. [Citation.] No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered.” (*People v. Gemelli*, (2008) 161 Cal.App.4th 1539, 1542.)

Reimbursement for Costs Associated with the Death of the Victims

The trial court ordered defendants to reimburse the victims’ family members for the costs associated with Devoe and Dillon’s deaths in the total amount of \$16,846.28. On appeal, defendants assert this order was made in error, because they were not convicted of crimes that resulted in the death of the victims. As such, the costs associated with the deaths should not be included in the restitution order.

“Courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction. ‘Subdivision (a)(3)(B) of section 1202.4 requires the court to order “the defendant”—meaning the defendant described in subdivision (a)(1), who was “convicted of that crime” resulting in the loss—to pay “[r]estitution to the victim or victims, if any, in accordance with subdivision (f).” Subdivision (f) of section 1202.4 provides that “in every case in which a victim has suffered economic loss *as a result of the defendant’s criminal conduct*, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (Italics added.) Construed in light of subdivision (a)(1) and (3)(B), the term “criminal conduct” as used in subdivision (f) means the criminal conduct for which the defendant has been convicted.’ [Citation.]” (*Woods, supra*, 161 Cal.App.4th at p. 1049.)

Defendants rely on *People v. Percelle* (2005) 126 Cal.App.4th 164 (*Percelle*), in which the defendant was sentenced to state prison for 14 years, and ordered to pay victim restitution based on the auto theft charge of which he was acquitted. (*Id.* at pp. 179-181.) This court found that in a nonprobation case, there is no case law or statutory authority permitting a trial court to order victim restitution for a dismissed or acquitted count, and therefore, the victim restitution order was unauthorized. (*Ibid.*) *Percelle* rejected the argument that restitution was authorized because section 1202.4, subdivision (f), required the court to order restitution to a victim who has suffered economic loss as a result of the defendant's "conduct." (*Percelle, supra*, 126 Cal.App.4th at p. 180.) *Percelle* said the subdivision merely described how to calculate the amount of restitution, and the statute in total made clear that the victim should receive restitution from a defendant *convicted of that crime.* (*Ibid.*)

In the present case, while originally charged with murder, defendants pleaded no contest to lesser charges pursuant to a plea bargain. Only defendants' fellow gang member, Michael Eti, who shot both victims, was convicted of murdering Dillon and Devoe. Defendants assert that because they merely participated in the gang fight by attacking Dillon and Devoe, they should not be ordered to pay costs associated with the deaths. Rather, Eti, as the actual shooter, should be the one financially responsible for Dillon and Devoe's deaths.

Defendants' argument fails to recognize the importance of the gang activity in this case. Specifically, defendants and Eti all participated in a concerted gang attack of Dillon and Devoe, which ultimately resulted in the victims' deaths. Unlike *Percelle*, defendants were *not acquitted* of any crime for which they were ordered to pay restitution. Rather, defendants pleaded no contest to the crime of assault with a firearm pursuant to section 245, subdivision (b), and admitted that the crime was committed for the benefit of, at the direction of and in association with a criminal street gang pursuant to section

186.22, subdivision (b)(1)(C).² Eti was the only person in the altercation that used a firearm during the fight when he pointed the gun at the victims and shot them. The fact that defendants pleaded no contest to assault with a firearm, and admitted that the crime was committed for the benefit of a street gang, supports the court's implied finding that they aided and abetted in Eti's shooting of the victims.

Based on the crimes of which defendants were convicted, the court properly ordered them to reimburse the victims' families for the costs associated with Dillon and Devoe's deaths. Here, the victims' families suffered economic loss as a result of defendants' crimes. Therefore, there was "a rational and factual basis for the amount of restitution ordered." (*People v. Gemelli, supra*, 161 Cal.App.4th 1539, 1542.)

Reimbursement for Medical Expenses

The court ordered defendants to reimburse Irwin Dillon's parents \$7,679.00 in medical expenses incurred before his death. Defendants assert this amount should be reduced to \$1,591.35, because the evidence suggests that was the actual amount of out-of-pocket costs incurred due to insurance payments.

Defendants' argument is contrary to legal authority. In *People v. Hamilton* (2003) 114 Cal.App.4th 932, the court held that the victim was entitled to the full amount of damages suffered as a result of the criminal conduct. In addition, the *Hamilton* court held that the total amount of restitution should not be offset by any amount paid by an insurance carrier. (*Id.* at pp. 940-941)

Here, the trial court's order that defendants pay \$7,679.00 as reimbursement for medical expenses incurred in Dillon's care was entirely within its discretion. The court

² Defendants Loia, Leaupepe, and Atualevao pleaded no contest to two counts of assault with a firearm pursuant to section 245, subdivision (a)(2); defendants Nuuelua Sofara and Fealofai Sofara pleaded to one count of assault with a firearm, and one count of assault with force likely to produce great bodily injury pursuant to section 245, subdivision (a)(1).

was under no obligation to offset the amount of restitution ordered by the amount that may have been paid by Dillon's insurance carrier.

Reimbursement for Expenses Incurred by Dillon's Aunt and Uncle

The court ordered defendants to reimburse Dillon's uncle, Murray Dillon, \$900.00 for his grandparents' travel expenses to attend court proceedings, and Dillon's aunt, Cassandra Carter, \$60.00 for parking and travel expenses to attend court proceedings. Defendants assert this order for reimbursement was in error, because Dillon's aunt and uncle are not victims as defined by the restitution statute.

Section 1202.4, subdivision (k)(3) provides a specific definition of " 'victim' " with regard to family members entitled to compensation for their losses as follows: "(3) Any person who has sustained economic loss as the result of a crime and who satisfies any of the following conditions: [¶] (A) At the time of the crime was the parent, grandparent, sibling, spouse, child, or grandchild of the victim. [¶] (B) At the time of the crime was living in the household of the victim. [¶] (C) At the time of the crime was a person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A). [¶] (D) Is another family member of the victim, including, but not limited to, the victim's fiancé or fiancée, and who witnessed the crime. [¶] (E) Is the primary caretaker of a minor victim." (§ 1202.4, subd. (k)(3).)

By our reading of the statute, the only family members other than a parent, grandparent, sibling, spouse, child or grandchild of the victim as stated in subdivision (A) entitled to restitution are those who lived in the household with the victim, previously lived in the household of the victim for a period of not less than two years, witnessed the crime or served as the primary caretaker of a minor victim. Here, it is immaterial that Murray Dillon was reimbursed for travel expenses associated with Irwin Dillon's grandparents to attend court proceedings. The record does not demonstrate that Murray

Dillon and Cassandra Carter, as Dillon's aunt and uncle, fall within any of the family definitions as described in the statute. As a result, the trial court's restitution order for their reimbursement was improper.

DISPOSITION

The judgment is modified to remove the portion of the restitution order to reimburse Murray Dillon \$900 and Cassandra Carter \$60. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.